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NO. 80-651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CLARENCE A. PRINGLE,
Appellant

V.

THE STATE OF TEXAS,
Appellee

On Appeal From The County Court of
Hale County, Texas

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the Hale Center municipal ordinances challenged herein are unconsitutionally vague?

2. Whether Appellant was impermissibly sentenced?

3. Whether Appellant was subjected to double jeopardy?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgments of the County Court of Hale County, Texas.

OPINIONS BELOW

There is no written opinion of the County Court of Hale County, Texas, in this case. Appellant has set

forth the judgments and sentences under which he was convicted and punished as Appendices C and D, respectively, to his jurisdictional statement.

JURISDICTION

The Court has jurisdiction over the cause. The judgments and sentences appealed were entered on June 20, 1980 (Petitioner's Appendix C), and July 28, 1980 (Petitioner's Exhibit D), respectively. Appellant submitted and was granted a motion for leave to file a motion for new trial under Tex. Code Crim. Proc. Ann. art. 40.05. As a result, the timely filed motion for new trial, which raised the issues Appellant raises herein, was considered and overruled by operation of law on September 25, 1980. Notice of appeal was timely filed the same day. The jurisdictional statement was filed and the appeal docketed in this Court on November 24, 1980, within ninety days after final judgment as evidenced by the denial of the timely filed motion for new trial. *See*, 28 U.S.C. §2101(d). Sup.Ct. R. 12, 13.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

Appellant cites and sets forth Ordinances Nos. 220, 291, of the Municipal Code of Hale Center, Texas. He also relies upon the due proess clause of U.S. Const. amends. V, XIV. Also involved is Tex. Rev. Civ. Stat. Ann. art. 6687-9, the Texas Abandoned Motor Vehicle Act, which provides in pertinent part as follows:

> Sec. 9. Junked vehicles which are located in any place where they are visible from a public place or public right-of-way are detrimental to the safety and welfare of the general public, tending to reduce the value of private property, to invite vandalism, to create fire hazards, to constitute an attractive nuisance creating a hazard

to the health and safety of minors, and are detrimental to the economic welfare of the State, by producing urban blight which is adverse to the maintenance and continuing development of the municipalities in the State of Texas and such vehicles are therefore, declared to be a public nuisance.

Sec. 10. Any city, town, or county within this State may adopt procedures for the abatement and removal of junked vehicles or parts thereof, as public nuisances, from private property, public property or public rights-of-way; provided, however, that any such procedures shall contain: [those provisions contained in Hale Center Municipal Ordinance No. 291]

* * *

...(h)...If a person is found guilty of maintaining a public nuisance as defined in Section 9 of this Act, the person shall be punished by a fine not to exceed two hundred dollars ($200) and the court shall order removal and abatement of the nuisance.

STATEMENT OF THE CASE

Because the complaints against Appellant contained in Appendix B to his jurisdictional statement are obviously mispaginated and misnumbered, Appellee cannot determine with certainty whether Appellant's characterizations of those complaints are accurate. Other allegations in Appellant's Statement of the Case are correct.

MOTION TO DISMISS

Pursuant to S.Ct. R. 16.1(b), the appeal should be dismissed because it fails to present a substantial federal question. Appellant complains that the language prohibiting "unsightly" and "objectionable" conditions contained in Ordinance No. 220 is unconstitutionally vague, but he was not found guilty for conduct constituting a violation only of those allegedly vague provisions. He was found guilty because of violations of those provisions *and* for another prohibiting "unsanitary" conditions. His convictions, therefore, rest independently upon uncontested criminal liability. They would remain valid even if this Court agreed with Appellant that the challenged provisions of the ordinance are invalid.

Appellant further complains that he was convicted for violation of Ordinance No. 291, which contains no provision for criminal penalties and with which he was not charged. Neither contention is true, as discussed below. Even if they were true, these are matters to be corrected by way of habeas corpus, either state or federal, and unworthy of this Court's attention. It is well-settled that a person cannot be found guilty of an offense with which he has not been charged. It is also well-settled that a criminal statute must give fair notice of the penalties that will be imposed against those who violate its terms. Appellant suggests no reason, and Appellee knows of none, why the Court should either reconsider or reaffirm these time-worn axioms of the criminal law. Appellant has other adequate remedies to redress such wrongs.

Appellant's double jeopardy claim is also plainly insubstantial, having been adversely and dispositively addressed only recently in *Brown v. Ohio*, 431 U.S. 161, 169 n. 8 (1977). There is no reason for the Court to write again on that which has so recently been decided.

The questions presented are insubstantial for another reason suggesting dismissal of the appeal under S.Ct. R. 16.1(a). Despite the existence of Tex. Rev. Civ. Stats. Ann. art. 6687-9, authorizing local governmental entities to enact such ordinances as No. 291, there is no allegation or showing that such ordinances are widespread even in Texas, much less elsewhere. The statutes plainly appear to be a valid exercise of municipal police power. The questions raised by Appellant are non-existent, answered upon the face of the ordinances, or amendable to relief elsewhere. The appeal should be dismissed for want of any question justifying the Court's attention.

MOTION TO AFFIRM

Pursuant to S.Ct. R. 16.1(d), the judgments should be affirmed because Appellant's complaints are without merit. First, the challenged ordinances are not vague. Outside the area of protected speech activities, this Court has limited attacks on vagueness grounds, requiring an examination "in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). In another case, the Court has stated, "While doubts as to the applicability of the language in marginal fact situations may be conceived, we think that the statute gave [the defendant]adequate warning that her act] was a criminal offense." *United States v. Powell*, 423 U.S. 87, 93 (1975).

In this case, Appellant was convicted for conduct which clearly falls within areas proscribed. Ordinance No. 220 prohibits allowing "rubbish, brush or any other unsightly, objectionable or unsanitary matter" to accumulate on any lot within the corporate limits of Hale Center. Whatever other things it might in some future case conceivably be construed to reach, this ordinance clearly prohibits that for which Appellant was convicted: "unlawfully and willingly allow[ing] rubbish,

trash and other unsightly, objectionable *and unsanitary* matter, specifically, junked vehicle bodies, scrap iron, empty petroleum drums and other items of scrap metal to accumulate on lots in the City of Hale Center..." (emphasis added).

Appellant complains that the terms "unsightly" and "objectionable" are vague. Whatever the merits of theat debate, the question is not properly raised in this case because Appellant's conviction rests upon an allegation and finding that he has maintained *unsanitary* conditions. Appellant does not and could not successfully contend that the state has no right to prohibit such conditions or that men of ordinary understanding cannot fathom the meaning of the prohibiting language. Ordinance No. 220 is constitutional. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Colten v. Kentucky*, 407 U.S. 104 (1972).

Ordinance No. 291 is even more specific in its terms. Section 9 (Appendix A-2 of Appellant's jurisdictional statement) specifically declares junked vehicles as defined, to be a public nuisance. Appellant's assertion that he had no notice that such junked vehicles were prohibited is clearly without merit.

There is no merit to Appellant's argument that he was deprived of his right to earn a livelihood under *Greene v. McElroy*, 360 U.S. 474 (1959), and *Schware v. Board of Law Examiners*, 352 U.S. 232 (1957), by the operation of these ordinances. Ordinance No. 291 specifically provides:

Excepted from the provisions of this Ordinance are the following ... [2] A vehicle or part thereof which is stored or parked in a lawful manner on the property in connection with the business of a licensed vehicle dealer or junkyard.

Ordinance No. 291, Section 10(f)(2).

Hence, Appellant, if he operates a bona fide junkyard as he asserts, cannot be deprived of his livelihood by violation of Ordinance No. 291. If he is, then obviously he has a substantive defense under the statute. Deprivation of this defense might well provide a ground for habeas corpus relief or conceivably even a suit for damages under 42 U.S.C. §1983, but it provides no basis whatsoever for holding the ordinance unconstitutional. As to Ordinance No. 220, not even a keeper of a junkyard has the right to maintain unsanitary conditions, the circumstance for which Appellant has suffered criminal penalties, so he cannot complain of the operation of that ordinance.

Next, Appellant's complaints about the manner in which he was charged and sentenced are insubstantial and meritless. The specific language common to the sentences giving rise to his complaints is as follows:

> The defendant Clarence Pringle is hereby sentenced [to] a fine of $100.00 on each violation of Ordinance No. 220, together with all costs of prosecution and costs of Court. In violations of Ordinance No. 291, the defendant is hereby ORDERED to cease and desist the maintence [sic] of such conditions as may exist upon ten (10) days from the entry of this order to demonstrate compliance with this order. The State shall also recover all costs of prosecution and costs of court in cases alleging violation of Ordinance No. 291. (Appendix D to Appellant's jurisdictional statement.).

Appellant says that not all the complaints against him charge him with a violation of both ordinances. This averment is untrue. Although some of the complaints may not cite specifically the *number* of both ordinances,

none fails to allege the conduct proscribed by those ordinances. It is the allegation of proscribed conduct that is required by the due process clause, not a specific reference to any particular ordinance or statute. In fact, a statutory reference lacking allegations of specific conduct would itself be infirm.

In any event, Appellant was not imposed criminal sanctions for violation of Ordinance No. 291, but only Ordinance No. 220. Appellant erroneously urges that no criminal penalties are authorized for violation of No. 291. The plain import of the applicable state statute, Tex.Rev. Stats. Ann. art. 6687-9, sec. 10(h), authorizing the ordinance is that although the municipality must pass the enabling legislation set forth in the jurisdictional statement to enact Ordinance No. 291, the penalty provided in the state statute is self-operative upon such municipal enactment.

Thus, Hale Center could have attached criminal penalties to Appellant's acts, but, contrary to Appellant's allegations, it did not. The fine referred to in the sentences is plainly a fine for violation of Ordinance No. 220, which Appellant admits is authorized. No fine, but only a cease and desist order, is provided for in the sentence with respect to Ordinance No. 291. This order is civil, not criminal, in nature, and is plainly authorized by the terms of the ordinance, which states that the Municipal Court of Hale County, Texas, may "issue all orders necessary to enforce such procedures" to cause the removal of a vehicle or parts thereof declared to be a nuisance under the ordinance. Since the county court in the trial de novo on appeal exercises all the powers the municipal court had under the ordinance, such a "cease and desist order" is clearly within the power of the court to issue. The order plainly commands him to remove the conditions--unsanitary junked cars--for which he had just suffered the criminal and civil penalties of which he now complains.

Finally, Appellant's double jeopardy claim is without merit. Unlike *Brown v. Ohio*, 432 U.S. 161 (1977), this case does not involve a prosecutorial decision to divide "a single crime into a series of temporal or spatial units." 432 U.S. at 169. Rather, Ordinance No. 220 itself provides that "each and every day's violation shall constitute a separate and distinct offense." (Appendix A-1 to Appellant's jurisdictional statement). This is the type of case expressly distinguished by the Court in *Brown*, 432 U.S. at 169 n. 8.

Precisely like the statute at issue in *Blockburger v. United States*, 284 U.S. 299 (1932), this ordinance does not prohibit a course of conduct, but provides that each individual act is a violation. Each prosecution requires proof of an additional fact which the others do not, the date of the alleged violation. And it is significant that each additional complaint serves as further notice that the accused *continues* to be in violation of the ordinance. If the rule were otherwise, then a violator could simply pay his fine and continue to violate the ordinance with impunity, claiming that the double jeopardy clause has conferred continuing immunity for his continuous act. This cannot be the law. For this reason, an acquittal or conviction on any one of these charges acts as no bar to prosecution on any of the others.

CONCLUSION

For the above reasons, Appellee the State of Texas respectfully requests that this appeal be dismissed or affirmed.

Respectfully submitted,

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